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MAY A DESERTED HUSBAND LAWFULLY COMMIT ADULTERY? *Ristine* v. *Ristine*, 4 Rawle, 459, (1834). This somewhat startling query has apparently been answered in the affirmative by the courts of this state, so far, at least, as divorce cases are concerned. Of course, adultery, even by a deserted husband, is followed by criminal liability. But the proposition seemingly announced by our courts is that A, being deserted by B, his wife, may thereafter commit adultery, and notwithstanding his crime or crimes, obtain a divorce from his wife on the ground of desertion.

A sued B, his wife, for a divorce on the ground of desertion. B's answer alleged that A, since their separation, had lived in adultery with C. A's demurrer to this answer was overruled by the lower court. Decree reversed: *Ristine* v. *Ristine*, 4 Rawle, 459, (1834), Kennedy, J.

After desertion by his wife, the libellant lived with another woman in adultery. *Held*, that this was no bar to his obtaining a divorce on the ground of desertion: *Shoemaker* v. *Shoemaker*, 1 York, 133, (1880), Fisher, P. J.

In a libel for desertion, evidence of libellant's adultery subsequent to the desertion was ruled out and a divorce granted: *Leidig* v. *Leidig*, 2 D. R., 529, (1893), Reeder, J. *Larson* v. *Larson*, 3 Kulp, 215, (1884), Rice, P. J.; s. c. 14 Luz. L. Reg. 7 is to the same effect.

The question has not been mooted in the Supreme Court since 1834, but the Superior Court, so late as January 17, 1900, in an opinion by William W. Porter, J., approved *Ristine* v. *Ristine*, saying: "Adultery itself by a libellant after desertion by the respondent does not deprive the libellant of his right to a decree for desertion: *Ristine* v. *Ristine*, 4 Rawle, 459:" *Mendenhall* v. *Mendenhall*, 12 Pa. Sup. Ct. 297.

This astounding statement, shocking alike to one's chivalrous instincts and preconceived notions of the law, is based upon a construction by Justice Kennedy in 1834 of the Act of March 13, 1815, 6 Sms. L. 286, 1 P. & L. Dig. 1633, permitting the "*innocent and injured party* to obtain a divorce from the bond of matrimony" in certain cases. The seventh section of that act is as follows:

"In an action or suit . . . for a divorce for the cause of adultery, if the defendant shall allege and prove

(*a*) that the plaintiff has been guilty of the like crime, or

(*b*) has admitted the defendant into conjugal society or embraces after he or she knew of the criminal fact, or

(*c*) that the said plaintiff (if the husband) allowed of the wife's prostitutions, or received hire from them, or exposed his wife to lewd company, whereby she became ensnared to the crime aforesaid, it shall be a good defence and a perpetual bar against the same."

Thus were the three great principles of Recrimination, Condonation and Connivance recognized by our statutes.

But Justice Kennedy, reading the act and finding that it in words refers only to actions for adultery, applies the maxim "*expressio unius est exclusio alterius et expressum facit cessare tacitum*" and thereby in effect adds two additional clauses.

1. *None of these defences shall be allowed in an action for any cause other than adultery.*

2. *These shall be the only defences allowed in an action for adultery.*

Can this construction possibly be maintained? Is an adulterer, amenable to the criminal law, an "*innocent* and injured party" who can obtain relief *in foro conscientiæ* in respect of his marriage bond, against which he himself is the chief sinner?

Can a wife be compelled to return to a man whose arms are yet warm with the embraces of another woman? Can it be that a wife who, smarting under an indignity, as in *Hardie* v. *Hardie*, 162 Pa. 229, (1894), has left her husband, must return to him though the very next day he commits adultery and contracts syphilis?

To affirmatively answer these questions it must be contended (*a*)

that he who cometh into equity need *not* have clean hands and (*b*) that the criminal husband may profit by his own wrong.

It is difficult to see how Mr. Justice Kennedy reached the conclusion that the Act of 1815 must be construed entirely without reference to settled legal principles. A similar mistake, in an entirely different field of law, was corrected by Mr. Justice Mitchell, in *Bank* v. *Bank*, 159 Pa. 49, (1893).

A careful reading of *Middleton* v. *Middleton*, 187 Pa. 614, (1898), marking as it does an advance of sixty-eight years in the law of domestic relations, gives color to the belief and hope that *Ristine* v. *Ristine* would not be followed to-day by our Supreme Court. It must be borne in mind that in *Ristine* v. *Ristine* the libellant's adultery took place more than two years after the respondent's alleged desertion. The desertion was then an accomplished fact, and, in one aspect, the cause of action was perfect. That cause of action, however, is "Wilful and malicious desertion and absence from the habitation of the other without a reasonable cause, *for and during the space of two years:*" Act of March 13, 1815, 6 Sm. L. 286, 1 P. & L. Dig., 1633; and each of these ingredients must be established: *Angier* v. *Angier*, 63 Pa. 450, (1870). Desertion, therefore, is a continuous offence, with a *locus pœnitentiæ* covering two years, and any act done by the "innocent and injured party" during those two years which makes a return abhorrent and impossible tolls the statute and prevents the original wrongful act from ripening into a cause for divorce. Adultery must therefore be a complete defence. But if adultery is *ever* a defence in proceedings for desertion, the theory of *Ristine* v. *Ristine* is exploded and the case of necessity falls.

It would seem that if the wife proceeds against her husband for adultery, prior to any decree in her husband's libel against her for desertion, the desertion would be no defence. And yet judgment could not be given in favor of the libellant in both cases.

It is pleasant to note that similar statutes have received what seems to be a more reasonable construction in Massachusetts and Missouri: *Moors* v. *Moors*, 121 Mass. 232, (1876); *Nagel* v. *Nagel*, 12 Mo. 53, 55, (1848). As was said in the Missouri case: "Which party has a right to apply to the Court to set aside and vacate the marriage contract, when both parties have been guilty of a breach thereof?"

In other jurisdictions subsequent adultery is a perfect defence: *Reid* v. *Reid*, 21 N. J. Eq. 331, 333, (1871); *Hale* v. *Hale*, 47 Tex. 336, (1877); *Smith* v. *Smith*, 4 Paige, 432, 438, (1834); *Brisco* v. *Brisco*, 2 Add. Ec. R. 259, 2 Eng. Ecc., 294, 298, (1824). Bishop criticises *Ristine* v. *Ristine* as follows: "This case is authority also for a still more questionable doctrine, namely, that desertion continued for the statutory period is sufficient for divorce, though, during the later part of the time, it was justifiable by reason of the deserted party having subsequent thereto committed adultery. The contrary of this was laid down in Massachusetts: *Clapp* v. *Clapp*, 97 Mass. 531 (1867)."[1]

[1] Bishop on Marriage and Divorce, 190, (1891).

Recrimination is as old as the Mosaic law,[2] and has been defined to be "a showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce;"[3] and again as "the defence that the applicant has himself done what is ground for divorce either from bed and board or from the bond of matrimony."[4] As was well said by Lord Ardmillan:[5] "Divorce is, in my opinion, a remedy provided for the innocent party, and is not intended for cases in which both parties are guilty." "The doctrine," says Lord Stovell, "has its foundation in reason and propriety. It would be hard if a man could complain of the breach of a contract which he has violated . . . The parties may . . . find sources of mutual forgiveness in the humiliation of mutual guilt."[6] They are "suitable and proper companions,"[7] two miserable wretches, to be dismissed summarily from the consideration of the Court.[8] A person guilty of a breach of the marriage vow should not have the assistance of the Court to enforce *any marital right.*[9]

The authorities hold, as the result of the continuing nature of desertion, that desertion which has not lasted the statutory time before the commission of adultery is no bar to a divorce on the latter ground: *Wilson* v. *Wilson*, 40 Iowa, 230, 232, (1875); *Dupont* v. *Dupont*, 10 Iowa, 112, 114, (1859); *Hall* v. *Hall*, 4 Allen, 39, 40, 41, (1862); *Adams* v. *Adams*, 17 N. J. Eq. 324, 328, (1866). It would seem to follow that in case of cross libels, where a deserted husband had committed adultery within the statutory period, there might possibly be a decree in favor of the wife.

The English rule is that if the complaining party has been guilty of adultery, even though committed after bringing of the suit, or after a decree *nisi* dissolving the marriage, but before it is made absolute, a divorce will not be granted: *Hulse* v. *Hulse*, L. R. 2 P. & D. 259, (1871); *Barnes* v. *Barnes*, L. R. 1 P. & D. 572, (1868); *Robinson* v. *Robinson*, L. R. 2 P. D. 75, (1877); *Ravenscroft* v. *Ravenscroft*, L. R. 2 P. & D. 376, (1872); *McCord* v. *McCord*, L. R. 3 P. & D. 237, (1875); *Otway* v. *Otway*, L. R. 13 P. & D. 141, (1888).

On principle and authority, Bishop's broad statement of doctrine should be accepted as sound:

"*It is a bar to any suit to dissolve a valid marriage, or separate the parties from bed and board, that either before or after the complained of delictum transpired, the plaintiff did what, whether of the like offending or any other, was cause for a divorce of either sort:*" 2 Bishop, 174, and cases cited.

Ira Jewell Williams.

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[2] Deut. xxii, 13-19.
[3] Stewart on Marriage and Divorce, 277 and cases cited.
[4] 2 Bishop, 165.
[5] Brodie *v.* Alexander, 8 Scotch Sess. Cas. 3d Ser. 854, 856, (1870).
[6] Beeby *v.* Beeby, 1 Hag. Ec. 789, 790, 3 Eng. Ec. 338, 339, (1799).
[7] Chancellor Walworth, in Wood *v.* Wood, 2 Paige, 111, (1830).
[8] Horne *v.* Horne, 72 N. C. 530, 533, (1875).
[9] Hope *v.* Hope, 1 Swab. & Tr. 94, 107, (1858).

ANTICIPATORY BREACH OF CONTRACT—STATUTE OF LIMITATIONS.—*Henry* v. *Rowell*, 64 N. Y. Supp. 488 (1900). The doctrine is now well established in the law, that the renunciation of a contract by one of the parties before the time for performance has come discharges the other, if he so choose, and entitles him at once to sue for a breach—*Hochster* v. *De la Tour*, 2 E. & B. 678 (1853); *Frost* v. *Knight*, L. R. 7 Exch. 114 (1872). A very recent case in New York, *Henry* v. *Rowell*, 64 N. Y. Supp. 488 (1900), involves an additional point of great interest, and seeks to answer the question: *Must* the promisee bring suit immediately upon the anticipatory declaration by the promisor of an intention to break the contract in order to prevent his action being barred by the Statute of Limitations? Or, to express the problem more concisely: Does the Statute of Limitations begin to run from the time of the promisor's announcement of his intention to disregard the contract, or does it run only from the time when the promisor was to have performed his part of the contract and failed to do so?

The case arises upon the following facts: The plaintiff entered into a contract with his sister (the defendant's decedent) in 1872. By the terms of the agreement the plaintiff was to board and lodge his sister in his household as long as she should live, and she in return was to devise to the plaintiff by will all the property she should own at the time of her death. In 1884, however, she left the plaintiff's household and took up her permanent abode elsewhere. She died in 1898, leaving the plaintiff a merely nominal sum, and devising the great bulk of her property to others. The plaintiff then brought suit against her executor for damages sustained by decedent's breach of contract, estimating those damages on a *quantum meruit* for board and lodging furnished from 1872 to 1884. The defendant pleaded the Statute of Limitations on the ground that the plaintiff's right to sue accrued when the decedent left his household in 1884, and could not therefore be brought after 1890.

The court gives judgment for the defendent. It takes the ground that the decedent's termination of her relation of boarder to the plaintiff was in itself notice to him that the contract was not to be carried out by her, and that therefore his right of action accrued immediately. It draws a distinction between the present case and those cases (such as *Hochster* v. *De la Tour* and *Frost* v. *Knight*, *supra*) where the performance of the contract has not yet been entered upon, but is to occur or be begun at a future time, and notice of a refusal to perform is given by one party in advance. In such cases, although the other party *may* treat such advance notice as a breach and bring an action therefor at once, it seems that he may instead treat the contract as continuing in life until the contract day, and sue for the final breach made on that day. Even in those cases, the court deems it doubtful whether the Statute of Limitations would not be held to run from the time the advance notice of a refusal to perform is given. But "however that may be," says the court, "in cases like the present one, where the contract is broken while it is being performed by the parties, the cause of action for the breach which arises at once is the only cause of action which accrues.

That the contract is not yet completed is no reason for postponing the commencement of the action to the time when it would be completed if carried out, and reckoning the running of the statute from that time. The plaintiff here was not at liberty to continue to treat the contract as in life until the decedent's death."

The opinion of the court rests, not on any satisfactory legal reasoning, but on the authority of *Bonesteel* v. *Van Etten*, 20 Hun. 468 (1880), which overruled the prior case of *Quackenbush* v. *Ehle*, 5 Barb. 469 (1849). In *Bonesteel* v. *Van Etten* (where the facts were almost identical with those in the present case) it was held that if services are rendered on a promise that certain property shall be devised to the person rendering them by the will of the person for whom they are rendered, and the services contracted for are not completed because the person is prevented from completing them by the promisor, the promisee's right of action upon *quantum meruit* accrues immediately upon the promisor's renunciation of the contract by such prevention, and is barred in six years from that date. It seems to the present writer, however, that although on the facts of these cases the court decreed the proper judgment, it did so merely fortuitously; that there is no real distinction such as the court seeks to draw between *Hochster* v. *De la Tour* and *Henry* v. *Rowell*, and that the court in the latter case seeks in its dicta to generalize principles laid down in *Bonesteel* v. *Van Etten*, although the latter were meant to apply only to actions on *quantum meruit* for services actually rendered. An important distinction would appear to exist, which the court has failed to note, but which, if observed, would not only clarify the law upon this troublesome point, but also be eminently just and in accordance with legal principles, applying to the whole line of cases of which *Hochster* v. *De la Tour* was the first.

In a case like *Henry* v. *Rowell* the plaintiff might, it would seem, bring either one of two kinds of actions. He might sue (as he in fact did) upon a *quantum meruit* for board and lodging furnished to the defendant's decedent. That is to say, he could ignore the express contract entered into with, and broken by, her, and allow the law to assume for him, as it does, that the decedent had, by implication, promised him that if she at any time should break her express contract and leave his household, she nevertheless would be indebted to him in an amount to recompense him for the food, labor, etc., expended by him in boarding and lodging her while she remained. This implied contract would be totally distinct from the express contract, and the right to sue on it as on a *quantum meruit* would accrue, of course, when the labor (to recompense the furnishing of which the law raises the implication) ceased. In the present case the defendant's decedent left the plaintiff's house in 1884. If, therefore, he wished to recover on the promise *implied* by law to be paid for work done and goods furnished prior to that time, he must sue before barred by the statute in 1890. The time when the sister died and failed in her will to perform her part of the express agreement entered into by her with the plaintiff, would not affect the question, because the plaintiff is not suing on this express agreement, and therefore *its* actual time of performance would in nowise determine

the running of the Statute of Limitations with regard to the action on the *quantum meruit.*

There remains, however, the other possibility which the court seems to have confused. Suppose, instead of on a *quantum meruit*, the plaintiff were to sue on the express contract. The dicta of the court in both *Bonesteel* v. *Van Etten* and *Henry* v. *Rowell* would seem to hold here also that the statute would run from the time the defendant's decedent, by leaving the plaintiff's household, practically renounced the contract and gave notice to him that she would not devise her property to him upon her death as she had agreed to do. It seems to the writer that, on the express contract, the statute should not be held to run until the time for performance actually arrives, *i. e.*, until the sister's death. It is true that the plaintiff might, if he chose, bring action at once upon her announced prior renunciation, as in *Hochster* v. *De la Tour.* But *Avery* v. *Bowden*, 5 E. & B. 714 (1855), is an express authority for the doctrine that even if the defendant did renounce the contract prior to the arrival of the time of performance, such renunciation might be disregarded by the plaintiff, at his option; he might, if he so desired, keep the contract alive until the time for performance arrived, and if the defendant did not then perform, an action would lie, not for the prior renunciation, but for the failure to perform. In the present case, if the plaintiff wished to do this, he might claim as damages the difference between the value of the property left by his sister at her death (which she was to have devised to him) and the cost to which she would have been subjected had she continued to board with him for life. Such an estimate would meet the requirement laid down in *Robinson* v. *Harman*, 1 Exch. 855 (1848), for measuring damages, viz., that "where a party sustains a loss by reason of a breach of contract, he is to be placed in the same situation, with respect to damages, *as if the contract had been performed.*"

If therefore the plaintiff, instead of suing immediately upon a *quantum meruit*, would prefer to take the above method of estimating his damages, suing on the express contract, it is evident that *such* an action could not accrue until the time for performance actually arrived, and that therefore the Statute of Limitations could be construed as running only from the time of the sister's death. For, in the first place, the contract stipulated that she was to devise to him whatever property she owned at the time of her death, and of course until that time arrived this property would be an unknown quantity, and therefore the plaintiff could not liquidate his damages. In the second place, it is possible that the sister may have voluntarily released the plaintiff from his share of the contract, and, although leaving his household, she may have entertained no idea of failing to devise him her property. Or she may have had such an idea, but repented before the time for performance arrived. Why therefore should the plaintiff, instead of bringing a *quantum meruit* action, not be allowed to wait until the time for performance actually arrives, and then, if the promisor fails to perform, bring an action for damages on the *express* contract?

This option, if allowed, would not only be advantageous to both

parties, but would follow the law as laid down prior to *Bonesteel* v. *Van Etten*, while even in that case the decision that the statute runs immediately from the promisor's renunciation of the contract applied only to the fact that the action in that case was, not on the contract itself, but on a *quantum meruit*. The distinction contended for is hinted at in Wood, Lim. Act, § 120, when he says: "Where a person employed under an entire contract is discharged before its completion, his right of action for wages *already earned* accrues at once (*Bonesteel* v. *Van Etten*); but his claim for damages does not accrue so as to become complete, and consequently so that the statute will run against it, until the term for which he was originally employed was ended; for while he may bring an action at once for such damages as he has sustained, yet he thereby waives all future damages, and he has a right to wait until the period is ended, and sue for the damages he has actually sustained from the breach of the contract." In *Hochster* v. *De la Tour*, *supra*, it is laid down that "it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." And in *Frost* v. *Knight*, *supra*, it is stated that "The cases show that the promisee may, if he pleases, treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive, for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it." . . . .

The plaintiff, in *Henry* v. *Rowell*, seems to have brought his action on a *quantum meruit*. Therefore the court was undoubtedly right in giving judgment for the defendant, since such action was barred by the statutes within six years from the time the defendant's decedent left the plaintiff's house, and the plaintiff's services consequently ceased. But to draw, as the court does, a distinction between this case and the general one of *Hochster* v. *De la Tour* is highly confusing, and to lay down the general rule without qualification, that the statute runs from the promisor's announcement of an intention to break his contract, instead of from the breach itself, when the time for performance arrives, is as logical as to say that the statute in trover runs from a thief's announcement of his intention to steal goods, instead of from the actual conversion of the property itself. The true rule, foreshadowed by the previous cases, but confused in the dicta of *Henry* v. *Rowell*, would seem to be this: That, under the circumstances of *Henry* v. *Rowell*, the plaintiff

should be allowed either to sue on a *quantum meruit* for services actually rendered, which action would be barred within six years from the time those services ceased; or to wait until the promisor (the defendant's decedent) failed to leave her property to him in her will, and then, at her death, to sue on the express contract for the actual loss sustained by her failure to do so,—viz., the value of the property left by her, minus the expense to which he would have been subjected had she boarded and lodged with him for life. The latter action, which very evidently differs from that brought in *Bonesteel* v. *Van Etten* and apparently in *Henry* v. *Rowell*, ought not to be barred by the statute until six years after the death of the sister, and non-performance of her part of the contract.

H. S.

BANKS—CHECKS—ASSIGNMENT OF FUND.—*Henderson* v. *U. S. Nat. Bank*, 80 N. W. (Neb.) 898 (1899).—In this case the plaintiff was payee of a check drawn on the A bank, which check was deposited with the B bank for collection, and by it forwarded to the C bank for collection, and by it forwarded to the D bank for collection and by it collected. The amount of the check was $716.22. The D bank, in returning the amount of the said check, drew its check on the C bank payable to the cashier of the C bank. On the day the check was received the D bank had on deposit with the C bank only $569.82. Immediately after the receipt of the check the C bank applied the funds of the D bank on deposit in payment of certain unmatured debts of the D bank to the C bank and dishonored the check because of insufficient funds.

Plaintiff thereupon demanded payment of the amount of deposit with the C bank in favor of the D bank at the time of the reception of the check, and upon refusal brought this action against the C bank for the recovery of the amount of the check, which resulted in a judgment for the defendant bank.

The plaintiff, on appeal, contended (1) that the check of the D bank on the defendant operated as an assignment of the former's deposit with the latter in favor of the plaintiff, and that, as against him, the defendant could not apply the amount of deposit to the unmatured debts of the D bank; (2) that if the check was an assignment of the whole sum named therein, the defendant could not refuse payment of the amount on deposit even though less than the amount called for in the check.

Chief Justice Harrison, in his opinion, affirmed the plaintiff's first proposition, quoting the decision of the same court in *Fonner* v. *Smith*, 31 Neb. 107: "A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof—in effect an assignment of the amount of the check—and the holder, upon refusal of the bank to pay the same where such funds have not been drawn out before its presentation, may bring an action thereon in his own name." However, the learned judge restricted the scope of the above principle to those cases only where the amount in bank exceeds the amount stated in the check. In the

light of this qualification we have the court's decision in the following words: "The check being for a greater sum than stood to the credit of the drawer, the bank was under no obligation to pay the check or to make the partial payment."

From the foregoing we gather that the real question determined in this case was that, irrespective of the question concerning the contractual relations of the bank with the holder, no bank can be compelled to honor a check unless the depositor's account equals or exceeds the amount called for in the check, nor is it necessary to pay over the amount then on deposit, being less than the sum called for in the check.

What is a check but an order by the depositor directing the bank to pay a particular portion of the deposit? If a bank cannot be compelled to pay an amount in excess of the order or check, how could it be compelled to pay an amount less than the check names? This seems to be good law supported by numerous authorities. *In re Brown*, 2 Story 512 (1843); *Coates* v. *Preston*, 105 Ill. 473 (1883); *Dana* v. *Third Nat. Bank of Boston*, 13 Allen (Mass.) 446 (1866).

Standing out in distinct contrast with this view and these authorities is *Bromley* v. *Bank*, 9 Phila. 522 (1872), where a check in excess of the amount in bank was dishonored, and yet the bank was compelled to pay the amount then on deposit. Pierce, J., says: "The cases treat a check on a banker as an equitable assignment or appropriation. . . . It follows as a consequence that if such a check is an appropriation of the whole sum for which it calls it is an appropriation of any smaller sum which may be in his hands, if there be not sufficient to pay the amount of the check."

The only possible distinction between this and *Henderson* v. *Bank* is that in the former an offer was made by the holder to deposit a sufficient sum to make it equal with the check. But the fallacy of that ground is apparent when we recall that a bank can inform a third party of the state of its drawer's account only at its own peril. *Foster* v. *Bank of London*, 3 F. & F. 214 (1862).

Thus we observe that while these two cases are identical in their premises they are directly opposed in their conclusions. Moreover, a glance at the authorities in the United States and England reveals the anomaly that in the majority of jurisdictions the conclusions that a bank need not pay an overdraft are identical, but the premises, that a check is an assignment of the fund, are directly opposed to each other. This clash in the authorities over the rights of the check holder is worthy of note. It is held, on the one hand, that no action will lie because there is no privity of contract between the holder and the bank until the check is presented and accepted by the bank. The leading case of *Bank of the Republic* v. *Millard*, 77 U. S. 156 (1869), has been religiously followed down to the present time in the majority of jurisdictions. Mr. Justice Davis said: "How can there be such privity when the bank owes no duty and is under no obligation to the holder. The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be connected with the transaction." The attitude of the

Pennsylvania Supreme Court is clearly put by Mr. Justice Green in *First Nat. Bank* v. *Shoemaker*, 117 Pa. 94 (1887): "It has been repeatedly held that the holder of a bank check has no right of action against the bank. . . . *Saylor* v. *Bushong*, 100 Pa. 23; *Northumberland Bank* v. *McMichael*, 106 Pa. 460 (1884); *Bank* v. *Millard*, 10 Wall. 152 (1869). In *Harrisburg Nat. Bank's Appeal*, 10 W. N. C. 137 (1881), we said that an ordinary bank check is neither an equitable assignment nor appropriation of the corresponding amount of the drawer's fund in the hands of the drawee. It gives the payee no right of action against the drawee nor any valid claim to the funds of the drawer in his hands." While the weight of authority follows this theory, it seems that it is based upon a technicality, for what after all is privity but a thing which the law manufactures whenever it sees fit?

The other class of cases is grounded on the theory of an implied promise by the bank to the check holder arising from the well-known usages of banking business. Chief Justice Caton gives the key to the situation in *Munn* v. *Burch*, 25 Ill. 35 (1860): "Universal custom shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may call for and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check shall, upon presentation, thereby become the owner and entitled to receive the amount called for by the check, provided that the drawer shall at the time have the amount on deposit." This theory is followed in Illinois, Nebraska, Iowa, Kentucky and South Carolina. Its fallacy has never been pointed out, its argument never answered. On the other hand, we think the argument in *Bank* v. *Millard* is refuted by the fact that the privity deemed so necessary by Justice Davis is created by the implied promise held out to the world, by the bank on the one side and the presenting of the check on the other.

Many text writers, after a careful study, conclude in favor of the holder's right to sue. *Morse on Banks and Banking* (2d ed.), §480; *Daniel on Negotiable Instruments* (4th ed.), Vol. 2, §1638; *4 Kent Com.*, 549, note 4th ed.; *Byles on Bills*, 18.

We believe the courts are slowly coming to realize the hardship of the present state of the law, and, in conformity with the demands of business customs, are beginning to shift the foundation of their decisions from one imbedded in the sands of mere technicality to one imbedded in the rock of sound reason, which has for its object the promotion of justice, security of good faith and convenience in transacting business.

F. W. S.